Mat Shuhaimi bin Shafiei v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-09–212–09 OF 2011
ABDUL MALIK ISHAK, AZAHAR MOHAMED AND ZAWAWI SALLEH JJCA
26 DECEMBER 2013

Constitutional Law — Fundamental liberties — Freedom of speech and expression — Article published in blog containing views on Laws of the Constitution of Selangor, 1959 — Whether views seditious — Right to freedom of speech and expression — Whether right absolute — Whether intention must be proven — Sedition Act 1948 — Whether good law

Criminal Law — Sedition Act 1948 — s 4 — Article published in blog — Blog author published views on the Constitution of the State of Selangor — Whether views seditious — Filing of notice of motion — Application to have criminal prosecution struck out — Whether consistent with Federal Constitution — Whether valid — Whether charge could be sustained

In the sessions court, the appellant was charged under s 4(1) of the Sedition Act 1948 ('the Act') for the offence of publishing in a blog, an article containing his views in relation to the Laws of the Constitution of Selangor, 1959 which were said to be seditious. The appellant pleaded not guilty and claimed trial to the charge. Before commencement of the trial, the appellant filed a notice of motion to the High Court and sought for the criminal prosecution instituted against him before the sessions court to be struck out and/or set aside and/or quashed and/or stayed; an order that s 4 of the Act was inconsistent with art 10 read together with arts 5 and 9 of the Federal Constitution ('Constitution') and was therefore void and invalid by virtue of arts 4 and/or 162 of the Constitution; the Act did not comply with art 10(2)(a) of the Constitution and could not be objectively be said to be a reasonable restriction nor did it fulfil the objective of art 10(2)(a) of the Constitution and it was wholly disproportionate to the valid reason permitted by law to restrict the fundamental right of the appellant under the Constitution; and for the High Court to acquit and discharge him as the charge could not be sustained. The High Court dismissed the appellant's application and hence, the present appeal.

Held, dismissing the appeal:

(1) Adopting the principle that the presumption of constitutionality would favour the impugned statutory provision, the appellant carried the

burden to show otherwise. Failure to do so would inevitably mean that the impugned statutory proviso was valid and constitutional. Being a pre-Merdeka law, the Sedition Act is governed by art 162 of the Constitution. Section 4(1) of the Act was not caught within the purview of art 4(1) of the Constitution. Since the Act was enacted in 1948, any application to declare the impugned law as null and void for being inconsistent with art 4 of the Constitution must be dismissed as it was grounded on the wrong premise (see paras 11, 17, 25–26).

(2) The right to freedom of speech and expression would only be accorded to citizens and was not absolute. No one could deny that there must be some restrictions to this right. Under s 3(3) of the Act, the intention of the maker of the statements in making those statements was irrelevant (see paras 27 & 47).

(3) The power of the Attorney General ('AG') must be appreciated in the context of the allegation that there was selective prosecution adopted by him. The AG had the sole discretion of determining criminal prosecutions in this country. It would not be open to this court to inquire into the ground for the AG's decision to prosecute the appellant under s 4(1) of the Act punishable under s 4(1) of the same Act. It would also not be open to this court to inquire the merits of the exercise by the AG of his discretion. If the appellant was aggrieved that he was charged under s 4(1) of the Act, he should channel his complaint to the AG who could then decide whether to continue or discontinue with the criminal proceeding against him (see paras 61–62 & 67).

(4) The Act is constitutional and did not violate arts 10(1)(a) and (2)(a) of the Constitution. It was reasonable to maintain the Act because the government had a right to preserve public peace and order, and therefore, had a good right to prohibit the propagation of opinions which would have a seditious tendency (*Public Prosecutor v Ooi Kee Saik & Ors*). The Act being a pre-Merdeka law, is good law and would still be valid up to this very day. The validity of the Act comes under the saving provisions of art 162 of the Constitution (see paras 100 & 115).

[Bahasa Malaysia summary

Di mahkamah sesyen, perayu didakwa di bawah s 4(1) Akta Hasutan 1948 ('Akta') atas kesalahan menerbitkan di dalam blog, artikel mengandungi pandangannya berkaitan Perlembagaan Negeri Selangor yang mana dikatakan berunsur hasutan. Perayu memplid tidak bersalah dan menuntut perbicaraan kepada tuduhan tersebut. Sebelum permulaan perbicaraan, perayu memfailkan notis usul kepada Mahkamah Tinggi dan memohon untuk pendakwaan jenayah yang dimulakan terhadapnya di hadapan mahkamah sesyen untuk dibatalkan dan/atau diketepikan dan/atau dipatahkan dan/atau ditangguhkan; perintah bahawa s 4 Akta tidak konsisten dengan perkara 10

dibaca bersama dengan perkara 5 dan 9 Perlembagaan Persekutuan ('Perlembagaan') dan oleh itu batal dan tak sah mengikut perkara 4 dan/atau 162 Perlembagaan; Akta tidak mematuhi perkara 10(2)(a) Perlembagaan dan tidak boleh dikatakan secara objektif sebagai sekatan munasabah ia juga tidak memenuhi objektif perkara 10(2)(a) Perlembagaan dan ia tidak seimbang sepenuhnya kepada alasan sah yang dibenarkan oleh undang-undang untuk menyekat hak asasi perayu di bawah Perlembagaan; dan untuk Mahkamah Tinggi melepaskan dan membebaskan dia kerana tuduhan tidak dapat dikekalkan. Mahkamah Tinggi menolak permohonan perayu dan maka rayuan ini.

Diputuskan, menolak rayuan:

(1) Mengguna pakai prinsip bahawa anggapan keperlembagaan akan memihak peruntukan statutori yang dipersoalkan tersebut, perayu menanggung beban untuk menunjukkan sebaliknya. Kegagalan berbuat sedemikian akan tanpa kesangsian bermaksud bahawa peruntukan statutori yang dipersoalkan tersebut adalah sah dan berpelembagaan. Sebagai undang-undang pra-Merdeka, Akta dikawal oleh perkara 162 Perlembagaan. Seksyen 4(1) Akta tidak terangkum dalam lingkungan perkara 4(1) Perlembagaan. Memandangkan Akta digubal pada tahun 1948, apa-apa permohonan untuk mengisytiharkan undang-undang yang dipersoalkan tersebut adalah tak sah dan batal kerana tidak konsisten dengan perkara 4 Perlembagaan mesti ditolak kerana ia diasakan atas asas yang salah (lihat perenggan 11, 17 25–26).

(2) Hak kepada kebebasan bercakap dan bersuara akan diberikan kepada rakyat dan bukan mutlak. Tiada siapa pun boleh menafikan bahawa mesti terdapat beberapa sekatan kepada hak ini. Di bawah s 3(3) Akta, niat pembuat pernyataan dalam membuat pernyataan tersebut adalah tidak relevan (lihat perenggan 27 & 47).

(3) Kuasa Peguam Negara ('PN') mesti dinilai dalam konteks tuduhan bahawa terdapat pendakwaan terpilih yang digunakan oleh beliau. PN mempunyai budi bicara menentukan pendakwaan jenayah dalam negeri ini. Ia tidak akan terbuka kepada mahkamah ini untuk menyiasat alasan untuk keputusan PN untuk mendakwa perayu di bawah s 4(1) Akta boleh dihukum di bawah s 4(1) Akta yang sama. Adalah juga tidak terbuka kepada mahkamah ini untuk menyiasat merit pelaksanaan oleh PN mengenai budi bicaranya. Jika perayu tidak berpuas hati yang dia dituduh di bawah s 4(1) Akta, dia patut mengemukakan aduannya kepada PN yang boleh memutuskan sama ada untuk meneruskan atau tidak dengan prosiding jenayah terhadapnya (lihat perenggan 61–62 & 67).

(4) Akta adalah berpelembagaan dan tidak mencabuli perkara 10(1)(a) dan (2)(a) Perlembagaan. Adalah munasabah untuk mengekalkan Akta

kerana kerajaan mempunyai hak untuk memelihara ketenteraman awam, dan oleh itu, mempunyai hak untuk melarang penyebaran pendapat yang berunsurkan hasutan (*Public Prosecutor v Ooi Kee Saik & Ors*). Akta sebagai undang-undang pra-Merdeka, adalah undang-undang kukuh dan akan masih sah sehingga hari ini. Kesahan Akta terangkum di bawah peruntukan perkara 162 Perlembagaan (lihat perenggan 100 & 115).]

Notes

For cases on freedom of speech and expression, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2498–2522.

Cases referred to

Aminah v Superintendent of Prison, Pengkalan Chepa, Kelantan [1968] 1 MLJ 92 (refd)

Andrew Mujuni Mwenda & Anor v Attorney General [2010] UGCC 5 (not folld)

Assa Singh v Mentri Besar, Johore [1969] 2 MLJ 30, FC (refd)

B Surinder Singh Kanda v Government of the Federation of Malaya [1962] 1 MLJ 169, PC (refd)

Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, FC (refd)

Datuk Haji Harun bin Haji Idris v PP [1977] 2 MLJ 155, FC (refd)

Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697; [1992] 1 CLJ (Rep) 72, SC (refd)

Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213; [2007] 1 CLJ 19, CA (refd)

Fan Yew Teng v PP [1975] 2 MLJ 235, FC (refd)

Government of Malaysia v Iznan bin Osman [1977] 2 MLJ 1, PC (refd)

Karam Singh v Menteri Hal Ehwal Dalam Negeri [Minister of Home Affairs], Malaysia [1969] 2 MLJ 129, FC (refd)

Lau Dakkee v PP [1976] 2 MLJ 229 (refd)

Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)

Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)

Long bin Samat & Ors v PP [1974] 2 MLJ 152, FC (refd)

Madhavan Nair & Anor v PP [1975] 2 MLJ 264 (refd)

Mark Koding v PP [1982] 2 MLJ 120, FC (refd)

Melan bin Abdullah & Anor v PP [1971] 2 MLJ 280 (folld)

Minister of Home Affairs v Chu Choon Yong & Anor [1977] 2 MLJ 20, FC (refd)

Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors [2011] 6 MLJ 507, CA (refd)

Nadarajah v PP [2000] 4 MLJ 373, HC (refd)

Ooi Kean Thong & Anor v PP [2006] 3 MLJ 389, FC (refd)

Pengurusan Danaharta Nasional Berhad v Yong Wan Hoi & Anor [2007] 6 MLJ 709, HC (refd)

Poh Cho Ching v PP [1982] 1 MLJ 86 (refd)
PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116 (refd)
PP v Khong Teng Khen & Anor [1976] 2 MLJ 166, FC (refd)
PP v Lee Tin Bau [1985] 1 MLJ 388 (refd)
PP v Ooi Kee Saik & Ors [1971] 2 MLJ 108 (folld)
PP v Param Cumaraswamy (No 2) [1986] 1 MLJ 518 (refd)
PP v Pung Chen Choon [1994] 1 MLJ 566, SC (refd)
PP v Su Liang Yu [1976] 2 MLJ 128 (refd)
PP v Yee Kim Seng [1983] 1 MLJ 252 (refd)
R v Aldred (1909) 22 Cox CC 1 (refd)
R v Burns & Others (1886) 16 Cox CC 355 (refd)
Reddy v Employees Provindent Fund Board [1967] 2 MLJ 82 (refd)
Shri Ram Krishna Dalmia and 3 Others v Shri Justice SR Tendoikar and 3 Others AIR 1958 SC 538, SC (folld)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333; [2010] 3 CLJ 507, FC (folld)
Teh Cheng Poh v PP [1979] 1 MLJ 50, PC (refd)
Vishaka And Others v State of Rajasthan And Others [1997] 6 SCC 241, SC (refd)
Yeap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia & Ors [1975] 2 MLJ 279 (refd)

Legislation referred to

Criminal Procedure Code s 376(1)
Emergency (Essential Powers) Ordinance No 45 of 1970
Federal Constitution arts 4, 4(1), (2)(b), 5, 8, 8(1), 9, 10, 10(1)(a), (2)(a), (4), 145(3), 152, 152(1)(a), 160(2), 162, 162(1), (6), (7), 181, 181(1)
Human Rights Commission of Malaysia Act 1999 ss 2, 4(4)
Laws of the Constitution of Selangor, 1959
Sedition Act 1948 ss 2, 3, 3(1), (1)(a), (b), (c), (d), (e), (f), (2), (3), 4(1), (1)(c)
Sedition Act [UG]

Appeal from: Criminal Application No 44–72 of 2011 (High Court, Shah Alam)

Edmond Bon Tai Soon (Aston Paiva & Chan Yen Hui with him) (Kanesalingam & Co) for the appellant.
Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] The public prosecutor preferred a charge against the appellant before the

sessions court at Shah Alam for an offence under s 4(1)(c) of the Sedition Act 1948 (Act 15) ('the Sedition Act'). The charge reads as follows:

> Bahawa kamu pada 30 Disember 2010, di Pusat Khidmat Rakyat, 6/2, Jalan Anggerik Vanilla R 31/R, Kota Kemuning, 40460 Shah Alam di dalam negeri Selangor Darul Ehsan, telah menerbitkan satu penerbitan menghasut di laman web srimuda.blogspot yang mempunyai alamat web http://srimuda.bloqspot.com satu artikel bertajuk 'Pandangan saya berasaskan Undang-Undang Tubuh Kerajaan Negeri Selangor 1959' seperti Lampiran 'A' yang mengandungi ayat-ayat yang menghasut seperti yang digariskan; dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 4(1)(c) Akta Hasutan 1948 (Akta 15) yang boleh dihukum di bawah seksyen 4(1) Akta yang sama.

[2] 'Lampiran A' as alluded to in the charge contained the views of the appellant in relation to the Laws of the Constitution of Selangor, 1959 which were said to be seditious and particular emphasis was made in regard to the underlined portions of the appellant's views in 'Lampiran A' and, for convenience, we will now reproduce the underlined portions in its original Malay language text:

> Mengapa di peringkat persekutuan SPB Yang di-Pertuan Agong perlu bertindak mengikut nasihat YAB Perdana Menteri dalam perkara yang secara tersurat tidak pula menyebut baginda perlu mendapat nasihat YAB Perdana Menteri tetapi di Negeri Selangor, seolah-olah DYMM Sultan Selangor boleh bertindak tanpa mendapat nasihat YAB Dato' Menteri Besar hanya dengan alasan bahawa peruntukan undang-undang tubuh tidak menyatakan secara jelas baginda perlu merujuk kepada YAB Dato' Menteri Besar? Adakah SPB Yang di-Pertuan Agong sahaja Raja Berperlembagaan di dalam Negara ini?.
>
> Begitu juga dalam pelantikan Setiausaha Kerajaan Negeri yang lain. Mengikut amalan dan konvensyen, ianya akan dirujuk dan dibincangkan antara Ketua Negeri dan Ketua Kerajaan. Tetapi, apabila Negeri Selangor yang diperintah Pakatan Rakyat, amalan dan konvensyen ini tidak dibuat. Saya yakin dan percaya rakyat Selangor mahu YAB Dato' Menteri Besarnya dihormati oleh semua pihak termasuk pihak istana. Rakyat akan menolak sebarang tindakan 'beraja di mata, bersultan di hati' oleh mana-mana pihak yang bertindak sewenang-wenangnya, tidak kira sama ada oleh raja yang berjiwa rakyat atau rakyat yang berjiwa raja.
>
> Janganlah kerana hendak menegakkan benang yang basah, institusi negeri yang dihormati rakyat dijadikan perkakas oleh mana-mana pihak berkepentingan. Saya meneliti juga kenyataan Setiausaha Sulit tersebut yang menyatakan baginda DYMM Sultan Selangor seorang sultan yang tegas dan tidak berganjak dari keputusan yang telah dibuat. Bagaimana sekiranya keputusan yang dibuat atau cara keputusan itu dibuat adalah salah? Adakah baginda masih tidak akan berganjak? Harapan saya supaya ketegasan tidak dikelirukan dengan ego.
>
> Dalam sejarah telah terbukti, apabila rakyat bangkit menentang Raja, biarpun beribu tahun kebangkitan itu berlangsung akhirnya kebenaran akan menghenyak ketidakadilan. Rakyat akan menang dalam peperangan menentang ketidakadilan. Didoakan agar ia tidak berlaku di Selangor.

[3] The appellant pleaded not guilty and claimed trial to the charge. Before the commencement of the trial, the appellant filed an application dated 1 April 2011 (encl 1) by way of a notice of motion to the High Court at Shah Alam. An amended notice of motion in encl 9 pursuant to the order of the High Court dated 21 July 2011 was referred to and there, the appellant sought for the following prayers:

(1) That the criminal prosecution instituted against the appellant before the Sessions Court at Shah Alam in arrest case number 61-1-2011 be struck out and/or set aside and/or quashed and/or stayed.

(2) An order that section 4 of the Sedition Act is inconsistent with the Federal Constitution and is therefore void.

(3) Pursuant thereto, this Honourable Court is to acquit and discharge the appellant from the charge.

(4) Any other order which this Honourable Court deems fit and suitable.

[4] The application was supported by an affidavit of the appellant in encl 2 that was affirmed on 1 April 2011.

[5] The respondent responded by filing an affidavit in reply in encl 4 affirmed by Ishak bin Mohd Yusuff, a deputy public prosecutor, on 26 May 2011.

[6] By way of a response to encl 4, the appellant filed an affidavit in reply dated 24 June 2011 and that can be found in encl 7.

[7] The grounds supporting the appellant's application in encl 1 as amended by encl 9 are as follows:

(a) the charge against the appellant under the Sedition Act is contrary or not consistent with art 10 of the Federal Constitution read together with art 5 and art 9 of the Federal Constitution and it is therefore void and invalid by virtue of art 4 and/or art 162 of the Federal Constitution.

(b) the Sedition Act does not comply with art 10 cl (2)(a) of the Federal Constitution (which permits law that restricts the freedom of expression for several objectives) and it cannot objectively be said to be a reasonable restriction nor does it fulfill the objective in art 10 cl (2)(a) of the Federal Constitution and it is wholly disproportionate to the valid reason permitted by law to restrict the fundamental right of the appellant under the Federal Constitution.

(c) alternatively, the charge preferred against the appellant cannot be sustained and is an abuse of process because the prosecution is selective in

prosecuting the appellant under the Sedition Act for political purposes and therefore it is contrary to the provisions of the Federal Constitution.

[8] In due course, the learned High Court judge dismissed the appellant's application in encl 1.

[9] Aggrieved, the appellant now appeals to this court.

THE CONSTITUTIONAL CHALLENGE TO THE VALIDITY OF S 4(1)(C) OF THE SEDITION ACT

[10] In considering this issue, the following facts must be highlighted and put to the forefront:

(a) the Sedition Act is a pre-Merdeka law and it came into effect in Peninsular Malaysia on 19 July 1948 via Ordinance No 14 of 1948. The same Act came into effect in Sabah on 28 May 1964 via *gazette* notification LN149/1964 and it also came into effect in Sarawak on 20 November 1969 via *gazette* notification PU (A) 476/1969.

(b) Merdeka day falls on 31 August 1957.

(c) it is an old piece of legislation and it has not been repealed. Although it has been amended, it is still valid and enforceable.

[11] Since the appellant is challenging the constitutionality of s 4(1)(c) of the Sedition Act, it must be emphasised that there is a presumption in favour of constitutionality and the burden falls on the appellant to show that there has been a clear transgression of constitutional principles. A string of authorities will now be cited.

[12] Abdul Malik bin Ishak J (now JCA) in *Pengurusan Danaharta Nasional Berhad v Yong Wan Hoi & Anor* [2007] 6 MLJ 709, at p 749, had this to say in regard to the presumption of constitutionality:

> (a) The test of constitutionality is objective not subjective. There is always a presumption in favour of constitutionality and the burden is upon him who challenges the provision to show that it is unconstitutional.

[13] Earlier in the day, Richard Malanjum FCJ speaking for the Federal Court in *Ooi Kean Thong & Anor v Public Prosecutor* [2006] 3 MLJ 389, at p 396, in the same vein observed:

> But it has to be borne in mind that the Courts have been consistently applying the presumption of constitutionality in favour of impugned statutory provision and to succeed the onus is therefore on the party asserting otherwise to show.

[14] Hashim Yeop A Sani J (later Chief Judge of Malaya) in *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128, at pp 130–131, in fine language had this to say:

> In its approach to the problem the court ought prima facie, to lean in favour of constitutionality and should support the legislation if it is possible to do so on any reasonable ground and it is for the party who attacks the validity of the legislation to place all materials before the court to show either the enactment or the exercise of the power under it is arbitrary and unsupportable.

[15] Continuing at p 131, His Lordship Hashim Yeop A Sani J (later Chief Judge of Malaya) aptly said:

> (10) Finally on the presumption of constitutionality a legislation is not to be struck down as discriminatory if any state of facts may reasonably be conceived to justify it. In order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived as existing at the time of the legislation.

[16] Echoing the same sentiment, Suffian LP in *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155, at p 166, had this to say:

> 9. In considering art 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the Legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy.

[17] In our judgment, adopting the principle that the presumption of constitutionality favours the impugned statutory provision (referring to s 4(1)(c) of the Sedition Act 1948 (Act 15)), the appellant carries the burden to show otherwise. Failure to do so would inevitably mean that the impugned statutory provision is valid and constitutional.

[18] We will now proceed to the heart of the matter. Mr Edmund Bon Tai Soon for the appellant raised only one pertinent point for our consideration. He worded it in this way in his oral submission before us:

> That s 4(1)(c) of the Sedition Act 1948 (Act 15) read with the definition of 'seditious tendency' in s 3 of the same Act amounts to an unreasonable restriction of the appellant's right to 'freedom of speech and expression' under art 10(1)(a) of the Federal Constitution and that being the case, s 4(1)(c) of the same Act is rendered unconstitutional and should be struck out.

[19] It is now appropriate to reproduce s 4(1)(c) of the Sedition Act. That section enacts as follows (the relevant parts only):

4 (1) Any person who —

(c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; or shall be guilty of an offence and shall, on conviction, be liable for a first offence to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both, and, for a subsequent offence, to imprisonment for a term not exceeding five years; and any seditious publication found in the possession of the person or used in evidence at his trial shall be forfeited and may be destroyed or otherwise disposed of as the court directs.

[20] While s 3(1) of the Sedition Act defines 'seditious tendency' in this way:

3 (1) A 'seditious tencency' is a tendency —

(a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;

(b) to excite the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established;

(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State;

(d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State;

(e) to promote feelings of ill will and hostility between different races or classes of the population of Malaysia; or

(f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution or Article 152,153 or 181 of the Federal Constitution.

[21] Section 3(2) of the Sedition Act enacts as follows:

3 (2) Notwithstanding anything in subsection (1) an act, speech, words, publication or other thing shall not be deemed to be seditious by reason only that it has a tendency —

(a) to show that any Ruler has been misled or mistaken in any of his measures;

(b) to point out errors or defects in any Government or constitution as by law established (except in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in paragraph (1)(f) otherwise than in relation to the implementation of any provision relating thereto) or in legislation or in the administration of justice with a view to the remedying of the errors or defects;

(c) except in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in paragraph (1)(f) —

(i) to persuade the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure by lawful means the alteration of any matter in the territory of such Government as by law established; or

(ii) to point out, with a view to their removal, any matters producing or having a tendency to produce feelings of ill will and enmity between different races or classes of the population of the Federation,

if the act, speech, words, publication or other thing has not otherwise in fact a seditious tendency.

[22] We will now refer to the constitutional provisions relevant to the issue at hand. It is cl (1)(a) of art 10 of the Federal Constitution which provides that:

Freedom of speech, assembly and association

10 (1) Subject to Clauses (2), (3) and (4) —

(a) every citizen has the right to freedom of speech and expression; …

[23] This would be followed by cl (2)(a) and (4) of art 10 of the Federal Constitution which provide that:

(2) Parliament may by law impose —

(a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;

(4) In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2)(a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.

[24] At the very outset, it is pertinent to state that unless it is shown otherwise, the Sedition Act is a piece of legislation that has been properly enacted by Parliament. Being a pre-Merdeka law, it is governed by art 162 of the Federal Constitution which states as follows (the relevant parts only):

PART XIII

TEMPORARY AND TRANSITIONAL PROVISIONS

Existing laws

162 (1) Subject to the following provisions of this Article and Article 163, the existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modifications as may be made therein under this Article and subject to any amendments made by federal or State law.

(6) Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.

(7) In this Article 'modification' includes amendment, adaptation and repeal.

[25] Seen in this context, the impugned law — referring to s 4(1)(c) of the Sedition Act, is not caught within the purview of art 4 of the Federal Constitution which stipulates as follows:

Supreme Law of the Federation

4 (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

[26] Since the Sedition Act was enacted in 1948, any application to declare the impugned law — again referring to s 4(1)(c) of the Sedition Act, as null and void for being inconsistent with art 4 cl (1) of the Federal Constitution must be dismissed as it is grounded on the wrong premise.

WHETHER THE FREEDOM OF SPEECH AND EXPRESSION IS ABSOLUTE?

[27] It is patently clear that freedom of speech and expression is part and parcel of what is called the fundamental liberties in the Federal Constitution. Clause (1)(a) of art 10 of the Federal Constitution gives every citizen the right to freedom of speech and expression and it is the most controversial provision in the Federal Constitution compared to the other provisions under the chapter on fundamental liberties. But the right to freedom of speech and expression is only accorded to citizens and it is not absolute. No one can deny that there must be some restrictions to this right.

[28] Learned judges before us have expressed their views in regard to art 10

of the Federal Constitution. We now make reference to them and gratefully adopt them in this judgment. Chang Min Tat J (later SCJ) for instance, in the case of *Madhavan Nair & Anor v Public Prosecutor* [1975] 2 MLJ 264, at p 265, aptly said:

> Any condition limiting the exercise of the fundamental right to freedom of speech not falling within the four corners of Article 10 Clauses (2), (3) and (4) of the Federal Constitution cannot be valid.

[29] Mohamed Azmi J (later SCJ) in *Lau Dakkee v Public Prosecutor* [1976] 2 MLJ 229, at p 230, succinctly said:

> I need only add that Article 10(1) of the Federal Constitution guarantees the rights of every citizen to freedom of speech, assembly and association. These rights are, however, subject to any law passed by Parliament

[30] Raja Azlan Shah J (later the Lord President as His Majesty then was) in *Public Prosecutor v Ooi Kee Saik & Ors* [1971] 2 MLJ 108, at p 112, opined as follows:

> In my view, the right to free speech ceases at the point where it comes within the mischief of s 3 of the Sedition Act.

[31] In our judgment, the determination of what language is considered seditious is a mixed question of law and fact and it is up to the court to decide it.

[32] The Federal Court in *Fan Yew Teng v Public Prosecutor* [1975] 2 MLJ 235 dutifully followed the judgment of Ong CJ (Malaya) in *Melan bin Abdullah & Anor v Public Prosecutor* [1971] 2 MLJ 280, and held that, after the Emergency Ordinance No 45 of 1970, it was immaterial in sedition cases whether the words complained of were true or not.

[33] His Majesty Raja Azlan Shah J (later the Lord President of the Supreme Court) in *Public Prosecutor v Ooi Kee Saik & Ors* thought that the new sedition legislation suited the Malaysian temperament.

[34] Ong CJ (Malaya), on the other hand, in *Melan bin Abdullah & Anor v Public Prosecutor* at p 284, treated the 1970 amendment to the Sedition Act as an 'ad hoc legislation, passed to meet the special needs and circumstances of the times' and his Lordship expressed the hope that, 'as and when the justification no longer exists for banning fair comment on matters of public interest, the 1970 amendments to the Sedition Act will be removed'.

[35] While acknowledging the importance of free speech and expression in a democratic society, we must heed the sage words of Lord Denning in his famous book, *'Freedom under the Law' (Hamlyn Lectures, First Series)*, at pp 4, 5, 35 and 36 and there, in fine language, he wrote as follows:

> The freedom of the individual, which is so dear to us, has to be balanced with his duty; for, to be sure every one owes a duty to the society of which he forms part. By personal freedom I mean the freedom of every law-abiding citizen to think where he will on his lawful occasions without let or hindrance from any other persons It must be matched, of course, with social security, by which I mean the peace and good order of the community in which we live. The freedom of the just man is worth little to him if he can be preyed upon by the murderer or thief. Every society must have the means to protect itself from marauders. It must have powers to arrest, to search and to imprison those who break the laws.

[36] In the same book, Lord Denning had this to say:

> … In the last lecture I was concerned with personal freedom … Now I come to the freedom of his mind and of his conscience. This is just as important, if not more important, than his personal freedom. To our way of thinking, it is elementary that each man should be able to inquire and seek after the truth until he has found it. We hold that no man has any right to dictate to another what religion he shall believe, what philosophy he shall hold, what shall be his politics or what view of history he shall accept. Every one in the land should be free to think his own thoughts — to have his own opinions, and to give voice to them, in public or in private and … free also to criticise the government or any party or group of people … Although this principle seems obvious to us, it is on occasions prone to bring the individual into conflict with the State, or rather with the people who are in power in the State. This country, just as every country, preserves to itself the right to prevent the expression of views which are subversive of the existing constitution or a danger to the fabric of society…

[37] The chapter on Fundamental Liberties in the Federal Constitution do not recognise absolute freedom. Even Lord Denning was talking about freedom *under the law*. It is the law that will curtail freedom of speech and expression under cl(1)(a) of art 10 of the Federal Constitution. Thus, the words 'under the law' must be read after the passage in cl (1)(a) of art 10 of the Federal Constitution and when so read, it will be worded in this way, 'every citizen has the right to freedom of speech and expression under the law'. It must be borne in mind that in all the common law countries, freedom of speech and expression is not an absolute right under the law. It is subject to limitations.

[38] We give due accord to the fact that the right to freedom of speech and expression is recognised in international and regional human rights law. This right is captured and reflected in article 19 of the International Covenant on Civil and Political Rights, in article 10 of the European Convention on Human

Rights, in article 13 of the American Convention on Human Rights, and in article 9 of the African Charter on Human and Peoples' Rights.

[39] According to article 19 of the International Covenant on Civil and Political Rights, 'everyone shall have the right to hold opinions without interference' and 'everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'. And the same article 19 continues to say that the exercise of these rights carries 'special duties and responsibilities' and may 'therefore be subject to certain restrictions' in 'respect of the rights or reputation of others' or 'for the protection of national security or public order' or for 'public health or morals'.

[40] In short, restrictions to freedom of speech and expression are common denominators at international human rights level.

[41] Now, cl (2)(a) of art 10 of the Federal Constitution as reproduced earlier allows Parliament to impose 'such restrictions as it deems necessary or expedient' on eight specified grounds. These constitutional restrictions impinged on the freedom of speech and expression.

[42] The learned deputy public prosecutor in the person of Mr Awang Armadajaya bin Awang Mahmud alluded to the constitutional restrictions as listed in cl (2)(a) of art 10 of the Federal Constitution and he itemised them as follows:

(a) such restrictions as it deems necessary in the interest of the security of the Federation or any part thereof;

(b) such restrictions as it deems expedient in the interest of the security of the Federation or any part thereof;

(c) restrictions in (a) and (b) which are deemed necessary or expedient:

(i) friendly relations with other countries;

(ii) public order; or

(iii) morality; and

(iv) restrictions designed to protect the privileges of Parliament or of any Legislative Assembly; or

(v) to provide against contempt of court, defamation, or incitement to any offence.

[43] At this juncture, it is ideal to refer, once again, to the case of *Public*

Prosecutor v Ooi Kee Saik & Ors. There, Raja Azlan Shah J (as His Majesty then was) discussed the constitutionality of the Sedition Act and held, inter alia, that freedom of expression is not absolute. This was what His Majesty said at pp 111–112 of the report:

> Before I proceed to deal with the facts there is one point which assumes importance in the defence submission. Sir Dingle Foot has stressed the need to give the greatest latitude to freedom of expression. Dato Seenivasagam, as I understand him, said that the Sedition Act strikes at the very heart of free political comment. It is of course true, as a general statement, that the greatest latitude must be given to freedom of expression. It would also seem to be true, as a general statement, that free and frank political discussion and criticism of government policies cannot be developed in an atmosphere of surveillance and constraint. But as far as I am aware, no constitutional state has seriously attempted to translate the 'right' into an absolute right. Restrictions are a necessary part of the 'right' and in many countries of the world freedom of speech and expression is, in spite of formal safe-guards, seriously restricted in practice. In the United States all types of speech 'can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment'. (See *New York Times Co v Sullivan* 376 US 255 (1964)). The Supreme Court of India too has conceded that fundamental rights are subject to limitations in order to secure or promote the greater interests of the community. If I may quote a passage from *AK Gopalan v State of Madras* AIR 1950 SC 27:
>
> There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint; for that would lead to anarchy and disorder. The possession and enjoyment of all rights … are subject to such reasonable conditions as may be deemed to be, to the governing authority of the country, essential to the safety, health, peace and general order and moral of the community What the Constitution attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control.
>
> In England too, there is no unrestricted freedom of expression. Dicey's summary of the situation still holds good:
>
> Freedom of discussion in England is little else than the right to write or say anything which a jury of 12 shopkeepers think it expedient should be said or written. Such 'liberty' may vary at different times from unrestricted licence to severe restraint … the amount of latitude conceded to the expression of opinion has in fact varied greatly according to the condition of popular sentiment.
>
> (See *Law of the Constitution*, (3rd Ed), p 231). In this connection it is not out of place if I quote the well-known words of Sir Samuel Griffith CJ in *Duncan v State of Queensland* (1916) 22 CLR 536 576, which were quoted in the Privy Council case of *Freightlines, etc Ltd v State of New South Wales* [1967] 2 All ER 436:
>
> But the word 'free' does not mean extra legem any more than freedom means anarchy. We boast of being an absolutely free people, but that does not mean that we are not subject to law.

A My purpose in citing these cases is to illustrate the trend to which freedom of expression in the constitutional states tends to be viewed in strictly pragmatic terms. We must resist the tendency to regard right to freedom of speech as self-subsistent or absolute. The right to freedom of speech is simply the right which everyone has to say, write or publish what he pleases so long as he does not commit a breach of the B law. If he says or publishes anything expressive of a seditious tendency he is guilty of sedition. The Government has a right to preserve public peace and order, and therefore, has a good right to prohibit the propagation of opinions which have a seditious tendency. Any government which acts against sedition has to meet the criticism that it is seeking to protect itself and to keep itself in power. Whether such C criticism is justified or not, is, in our system of Government, a matter upon which, in my opinion, Parliament and the people, and not the courts, should pass judgment. Therefore, a meaningful understanding of the right to freedom of speech under the Constitution must be based on the realities of our contemporary society in Malaysia by striking a balance of the individual interest against the general security or the general morals, or the existing political and cultural institutions. Our D sedition law would not necessarily be apt for other people but we ought always to remember that it is a law which suits our temperament.

A line must therefore be drawn between the right to freedom of speech and sedition. In this country the court draws the line. The question arises: where is the line to be E drawn; when does free political criticism end and sedition begin? … The dividing line between lawful criticism of Government and sedition is this — if upon reading the impugned speech as a whole the court finds that it was intended to be a criticism of Government policy or administration with a view to obtain its change or reform, the speech is safe. But if the court comes to the conclusion that the speech used naturally, clearly and indubitably, has the tendency of stirring up hatred, contempt F or disaffection against the Government, then it is caught within the ban of para (a) of s 3(1) of the Act. In other contexts the word 'disaffection' might have a different meaning, but in the context of the Sedition Act it means more than political criticism; it means the absence of affection, disloyalty, enmity and hostility. To 'excite disaffection' in relation to a Government refers to the implanting or arousing G or stimulating in the minds of people a feeling of antagonism, enmity and disloyalty tending to make government insecure. If the natural consequences of the impugned speech is apt to produce conflict and discord amongst the people or to create race hatred, the speech transgresses paragraphs (d) and (e) of section 3(1). Again parah (f) of s 3(1) comes into play if the impugned speech has reference to question any of the four sensitive issues — citizenship, national language, special rights of the H Malays and the sovereignty of the Rulers.

[44] We pause here for a moment and take stock of the situation. We are dealing with the Sedition Act and s 2 thereof defines the word 'seditious' in this I way:

> … when applied to or used in respect of any act, speech, words, publication or other thing qualifies the act, speech, words, publication or other thing as one having a seditious tendency.

[45] Thus, it is an offence to act, speak or publish statements with a 'seditious tendency'. And on the authority of *Melan bin Abdullah & Anor v Public Prosecutor*, the prosecution need not prove that the words were true or otherwise.

[46] Section 3(3) of the Sedition Act throws the net wider in favour of the prosecution. It is worded in this way:

> 3 (3) For the purpose of proving the commission of any offence against this Act the intention of the person charged at the time he did or attempted to do or made any preparation to do or conspired with any person to do any act or uttered any seditious words or printed, published, sold, offered for sale, distributed, reproduced or imported any publication or did any other thing shall be deemed to be irrelevant if in fact the act had, or would, if done, have had, or the words, publication or thing had a seditious tendency.

[47] In its present form, under s 3(3) of the Sedition Act, the intention of the maker of the statements in making those statements is irrelevant. It is also not an essential ingredient of the offence under s 4(1)(c) of the Sedition Act for the prosecution to prove that the statements made will incite (or had incited) violence or public disorder.

[48] Based on the authority of *Public Prosecutor v Ooi Kee Saik & Ors*, the truth of the statements is also irrelevant.

[49] Learned counsel for the appellant complained that a person who makes a statement which:

(a) is not seditious; and

(b) made in good faith with a bona fide intention; or

(c) contains the truth of the matter;

would still be liable to be convicted for sedition under the Sedition Act.

[50] Learned counsel for the appellant lamented that the position is absurd, untenable and unreasonable.

[51] Learned counsel for the appellant further submitted that the Sedition Act does not distinguish between two categories of individuals, namely:

(a) those who are genuine in their speech and who speak the truth; and

(b) those who are not genuine and who wish to incite hatred and violence.

[52] Learned counsel for the appellant also submitted that the sting of the

Sedition Act contravened art 8 and 10 of the Federal Constitution following the guidelines of the Federal Court cases in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507(FC); and *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631(FC).

[53] On behalf of the appellant, it was argued that the crux of the legal challenge centred on s 4(1)(c) of the Sedition Act which is said to be inconsistent with art 10(1)(a) of the Federal Constitution read with the right to equal protection of the law as encapsulated in art 8(1) of the Federal Constitution thereby rendering the said s 4(1)(c) to be unreasonable and/or disproportionate to the mischief it seeks to curtail.

[54] Article 8 of the Federal Constitution reads as follows:

> 8 (1) All persons are equal before the law and entitled to the equal protection of the law.
>
> (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.
>
> (3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State.
>
> (4) No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.
>
> (5) This Article does not invalidate or prohibit —
>
> (a) any provision regulating personal law;
>
> (b) any provisions or practice restricting office or employment connected with the affairs of any religion or of an institution managed by a group professing any religion, to persons professing that religion;
>
> (c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;
>
> (d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election;

(e) any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;

(f) any provision restricting enlistment in the Malay Regiment to Malays.

[55] Clause (1) of art 8 of the Federal Constitution does not state that all persons must be treated alike, but it does say that persons in like circumstances must be treated alike. It is for the court to decide what constitutes unconstitutional discrimination. However, rational classification is permitted.

[56] In *Public Prosecutor v Khong Teng Khen & Anor* [1976] 2 MLJ 166 p 170, Suffian, Lord President writing for the Federal Court had this to say:

> The principle underlying art 8 is that a law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstance, nor that it 'must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons … for the purpose of legislation' … In my opinion, the law may classify persons … the law may classify offences into different categories; fiscal law may divide a town into different areas … All that art 8 guarantees is that a person in one class should be treated the same as another person in the same class …

[57] Again, Suffian, Lord President in *Datuk Haji Harun bin Haji Idris v Public Prosecutor* at pp 165–166, in fine language, laid down the principles of equality in the Malaysian context in this way:

1. The equality provision is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere.
2. The equality provision is qualified. Specifically, discrimination is permitted within cl (5) of art 8 and within art 153.
3. The prohibition of unequal treatment applies not only to the legislature but also to the executive — this is seen from the use of the words 'public authority' in cl (4) and 'practice' in cl (5)(b) of art 8.
4. The prohibition applies to both substantive and procedural law.
5. Article 8 itself envisages that there may be lawful discrimination based on classification — thus Muslims as opposed to non-Muslims (para (b) of cl (5) of art 8); aborigines as opposed to others (para (c)); residents in a particular State as opposed to residents elsewhere (para (d)); and Malays and natives of Borneo as opposed to others who are not (art 153).
6. … the first question we should ask is, is the law discriminatory, and that the answer should then be — if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either

A expressly allowed by the constitution or is allowed by judicial interpretation we have to ask the further question, is it allowed? If it is, the law is good, and if it is not, the law is void.

7. … the doctrine of classification should be accepted by our courts, subject to what we said in para 6 above. We adhere to what was said in *Public Prosecutor v Khong Teng Khen* … the courts should (not) leave it to the Legislature alone to go into the reasonableness of the classification, we think that the court should not, that in other words the court should consider the reasonableness of the classification.

8. Where there are two procedures existing side by side, the one that is more drastic and prejudicial is unconstitutional if there is in the law no guideline as to the class of cases in which either procedure is to be resorted to. But it is contitutional if the law contains provisions for appeal, so that a decision under it may be reviewed by a higher authority. The guideline may be found in the law itself; or it may be inferred from the objects and reasons of the bill, the preamble and surrounding circumstances, as well as from the provisions of the law itself. The fact that the executive may choose either procedure does not in itself affect the validity of the law. …

9. In considering art 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy.

10. Mere minor differences between two procedures are not enough to invoke the inhibition of the equality clause.

[58] Article 8 of the Federal Constitution does not require that person accused of like offences be charged under the same statute. It is the Attorney General, who in his wisdom, will decide under which statute the person is to be charged. And the Attorney General is entitled to discriminate without contravening art 8 of the Federal Constitution.

[59] Lord Diplock in *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 (PC), had this to say in regard to art 8 of the Federal Constitution (see p 56 of the report):

> There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them may vary enormously between one case and another. All that equality before the law requires, is that the cases of all potential defendants to criminal charges shall be given unbiassed consideration by the prosecuting authority and that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration.

[60] And when the Attorney General exercises his discretion to prosecute the acceptor and not the giver of bribes, he does not violate art 8(1) of the Federal Constitution (*Poh Cho Ching v Public Prosecutor* [1982] 1 MLJ 86). The High Court in *Public Prosecutor v Yee Kim Seng* [1983] 1 MLJ 252, upheld the discretion of the Attorney General to choose the statute under which charges will be instituted.

[61] The power of the Attorney General must be appreciated in the context of the allegation that there was selective prosecution adopted by him. The appellant's affidavit in support in enclosure two alleged that the Sedition Act has not been used against politicians from the ruling government when they themselves may have breached the provisions of the said Act. But it must be borne in mind that by virtue of art 145(3) of the Federal Constitution, the Attorney General has the absolute discretion 'to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial'.

[62] In our judgment, it is not open to this court to inquire into the grounds for the Attorney General's decision to prosecute the appellant under s 4(1)(c) of the Sedition Act punishable under s 4(1) of the same Act. It is also not open to this court to inquire into the merits of the exercise by the Attorney General of his discretion.

[63] Section 376(1) of the Criminal Procedure Code enacts that the Attorney General is the public prosecutor and he has the full control and direction of all criminal prosecutions and proceedings under this Code. The case of *Nadarajah v Public Prosecutor* [2000] 4 MLJ 373 examines the discretion of the Attorney General to initiate criminal proceedings.

[64] The law journals are replete with authorities in regard to the powers of the Attorney General as the public prosecutor. In *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116, it was held that the public prosecutor has power vested in him by virtue of art 145(3) of the Federal Constitution and that power is exercisable at his discretion whether to institute, conduct, or discontinue any proceedings.

[65] The court in *Public Prosecutor v Lee Tin Bau* [1985] 1 MLJ 388 emphasised on the discretion of the Attorney General in his capacity as the public prosecutor to decide on what charges to institute against anyone found in possession of firearms and ammunition.

[66] In *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152, at p 158, the Federal Court aptly said that art 145(3) of the Federal Constitution, 'gives the Attorney-General very wide discretion over the control and direction

of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue'.

[67] All these salient authorities showed that the Attorney General has the sole discretion of determining criminal prosecutions in this country and it is not open to this court to interfere or question the discretion exercised by the Attorney General. If the appellant is aggrieved that he is charged under s 4(1)(c) of the Sedition Act, he should channel his complaint to the Attorney General who would then decide whether to continue or discontinue with the criminal proceeding against him.

[68] It was argued on behalf of the appellant that whether the Sedition Act is considered to be a pre-Merdeka law or a post-Merdeka law, the tests to be applied in a constitutional challenge of the kind as advanced by the appellant would be the same. It was argued that the appropriate tests to be applied would be in this fashion by way of the following questions:

(a) whether s 4(1)(c) of the Sedition Act restricts a person's right to freedom of speech and expression?

(b) if the question is answered in the affirmative, then the next question to pose would be whether the restriction is unreasonable and/or disproportionate to its objective?

(c) should the answers to both questions be in the affirmative, then the court is empowered under art 162(6) and (7) of the Federal Constitution to repeal the pre-Merdeka legislation which is inconsistent with the Federal Constitution. The court too, it is said, is empowered under art 4(1) of the Federal Constitution to strike down the Sedition Act if it is considered to be a post-Merdeka law.

PRE-MERDEKA LAW

[69] We must reiterate that the Sedition Act is a pre-Merdeka law as it was enacted in 1948.

[70] All pre-Merdeka laws or described as 'existing laws' shall continue in force on and after Merdeka day. Article 160(2) of the Federal Constitution defines 'existing law' to mean 'any law in operation in the Federation or any part thereof immediately before Merdeka Day'. While art 162(1) of the Federal Constitution stipulates as follows:

Existing laws

162 (1) Subject to the following provisions of this Article and Article 163, the existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modifications as may be made therein under this Article and subject to any amendments made by federal or State law.

[71] This is followed by art 162(6) of the Federal Constitution which states as follows:

162 (6) Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.

[72] Where there is a conflict between the existing law and the Federal Constitution, the latter must prevail. This simple proposition of the law was set by Lord Denning in *B Surinder Singh Kanda v Government of the Federation of Malaya* [1962] 1 MLJ 169 (PC) at p 172 (MLJ); p 334 in these trenchant terms:

It appears to Their Lordships that, in view of the conflict between the existing law (as to the powers of the Commissioner of Police) and the provisions of the Constitution (as to the duties of the Police Service Commission) the Yang di-Pertuan Agong could himself (under art 162(4)), have made modifications in the existing law within the first two years after Merdeka Day. (The attention of Their Lordships was drawn to modifications he had made in the existing law relating to the railway service and the prison service.) But the Yang di-Pertuan Agong did not make any modifications in the powers of the Commissioner of Police, and it is too late for him now to do so. In these circumstances, Their Lordships think it is necessary for the court to do so under article 162(6). It appears to Their Lordships that there cannot, at one and the same time, be two authorities, each of whom has a concurrent power to appoint members of the police service. One or other must be entrusted with the power to appoint. In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail. The court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution. The necessary modification is that since Merdeka Day it is the Police Service Commission (and not the Commissioner of Police) which has the power to appoint members of the police service. And that is just what has happened. The Police Service Commission has in fact made the appointments. And Their Lordships are of opinion that they were lawfully made.

[73] And according to art 162(7) of the Federal Constitution, the word 'modification' includes amendment, adaptation and repeal.

[74] Raja Azlan Shah J (as His Majesty then was) writing a separate judgment in *Assa Singh v Mentri Besar, Johore* [1969] 2 MLJ 30 (FC), at p 46 aptly said:

> We are not here to repeal or amend the impugned law; that is a legislative function. We are to consider whether the impugned law which admittedly is silent on the question of fundamental rights must be read subject to these rights. Article 162(1) which deals with existing laws does not render them void ab initio. It expressly enacts that existing laws 'shall continue in force on or after Merdeka Day' with such modifications as may be necessary to bring it into conformity with fundamental rights. In other words, after Merdeka Day no existing laws can be allowed to stand in the way of the exercise of fundamental rights. Such inconsistent laws are not wiped off the statute book, for so to hold would be to give fundamental rights a retrospective effect which the law holds they have not: (see *Keshavan Madhava Menon v State of Bombay* [1951] SCR 228).
>
> The true position, in my opinion, is that the impugned law which violates fundamental rights becomes eclipsed until it is modified to remove the shadow and to make it free from blemish or infirmity. If that were not so, then it is not understandable what 'existing law' can be said to be modified so as to bring it into conformity with the Constitution. The impugned law which violates constitutional conditions is not a nullity or void ab initio but remains unenforceable by reason of those conditions, but once the conditions are observed the law becomes effective and I perceive no adequate grounds for adjudging that a re-enactment of the impugned law is required before it can have effect.

[75] By way of a summary, we have this to say. That in *B Surinder Singh Kanda v Government of the Federation of Malaya*, the Privy Council held that inconsistent existing laws must give way to the Federal Constitution even where an article of the Federal Constitution is expressed to be 'subject to existing laws'. We also say that there are a string of authorities that applied art 162(6) of the Federal Constitution generously, namely: *Aminah v Superintendent of Prison, Pengkalan Chepa, Kelantan* [1968] 1 MLJ 92; *Assa Singh v Mentri Besar, Johore* [1969] 2 MLJ 30; *Yeap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279; *Minister of Home Affairs v Chu Choon Yong & Anor* [1977] 2 MLJ 20 (FC); and *Government of Malaysia v Iznan bin Osman* [1977] 2 MLJ 1 (PC).

[76] However, there are cases which did not apply art 162(6) of the Federal Constitution because the existing laws were found to be consistent with the Federal Constitution. These cases may be cited as follows:

(a) *Reddy v Employees Provindent Fund Board* [1967] 2 MLJ 82;

(b) *Karam Singh v Menteri Hal Ehwal Dalam Negeri [Minister of Home Affairs], Malaysia* [1969] 2 MLJ 129, FC; and

(c) *Mark Koding v Public Prosecutor* [1982] 2 MLJ 120 123 (FC).

[77] Flowing from these legal semantics, the appellant submitted through his learned counsel that s 4(1)(c) of the Sedition Act must conform to the 'reasonable restriction test' in art 10(1)(a) of the Federal Constitution. It was submitted that if found to be unreasonable, then this court must make the necessary modifications under art 162(6) or 162(7) of the Federal Constitution and that modifications may include:

(a) a repeal; or

(b) a declaration of unenforceability; or

(c) an adaptation by adding into the offence the additional elements of 'intention to threaten or incite violence or public disorder' (this means that mere tendency would not suffice to support the offence).

POST-MERDEKA LAW

[78] The supremacy of the Federal Constitution as the supreme law of the Federation found expression in art 4 cl (1) of the Federal Constitution which has been reproduced earlier. In *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697; [1992] 1 CLJ (Rep) 72 (SC), Abdul Hamid Omar LP writing a separate judgment had this to say (at p 716 (MLJ); p 85 (CLJ) of the report):

> In all the circumstances, we have arrived at the unanimous conclusion that the direct and inevitable consequences of Article XXXIA of the Kelantan State Constitution which is designed to enforce party discipline does impose a restriction on the exercise by members of the Legislature of their fundamental right of association guaranteed by art 10(1)(c) of the Federal Constitution, and that such restriction is not only not protected by art 10(1)(c) of the Federal Constitution but clearly does not fall within any of the grounds for disqualification specified under s 6(1) of Part I to the Eighth Schedule to the Federal Constitution. Accordingly, we agree with the learned judge in the court below though on somewhat different grounds that by virtue of art 4(1) of the Federal Constitution. Article XXXIA of the Kelantan Constitution is to that extent void.

[79] The equality provision in art 8(1) of the Federal Constitution must be considered in construing the other parts of the Federal Constitution. And this was considered by us as alluded to somewhere in this judgment We are aware of the principle of substantive proportionality that was tied up to the equality provision in art 8(1) of the Federal Constitution. We are also aware that the restrictions imposed by art 10(2) of the Federal Constitution must be reasonable. For this purpose, the decision of this court in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213; [2007] 1 CLJ

19(CA), at pp 219–220 (MLJ); pp 28–30 (CLJ) must be referred to. There, Gopal Sri Ram JCA writing for this court had this to say:

> [8] The other aspect to interpreting our Constitution is this. When interpreting the other parts of the Constitution, the court must bear in mind the all pervading provision of art 8(1). That article guarantees fairness of all forms of State action. See, *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771. It must also bear in mind the principle of substantive proportionality that art 8(1) imports. See, *Om Kumar v Union of India* AIR 2000 SC 3689. This doctrine was most recently applied by this Court in the judgment of my learned brother Mohd Ghazali in *Menara Panglobal Sdn Bhd v Ariokianathan* [2006] 2 CLJ 501. In other words, not only must the legislative or executive response to a state of affairs be objectively fair, it must also be proportionate to the object sought to be achieved. This is sometimes referred to as 'the doctrine of rational nexus'. See, *Malaysian Bar & Anor v Government of Malaysia* [1987] 2 MLJ 165. A court is therefore entitled to strike down State action on the ground that it is disproportionate to the object sought to be achieved.
>
> [9] Against the background of these principles it is my judgment that the restrictions which art 10(2) empower Parliament to impose must be reasonable restrictions. In other words, the word 'reasonable' must be read into the sub-clauses of art 10(1). That words may be read into our Constitution has been established by the decision of the Federal Court in *Ooi Ah Phua v Officer in Charge Criminal Investigation Kedah/Perlis* [1975] 2 MLJ 198. In that case, an implied restriction in the interests of justice was read into article 5(3) of the Constitution which provides that:
>
> Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.
>
> Suffian LP said:
>
> With respect I agree that the right of an arrested person to consult his lawyer begins from the moment of arrest, but I am of the opinion that that right cannot be exercised immediately after arrest A balance has to be struck between the right of the arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public from wrongdoers by apprehending them and collecting whatever evidence exists against them. The interest of justice is as important as the interest of arrested persons and it is well-known that criminal elements are deterred most of all by the certainty of detection, arrest and punishment.
>
> So, although the Constitution did not have any words postponing the right to counsel, the Federal Court read those words into the article. So too here. We can read the word 'reasonable' before the word 'restrictions' in art 10(2)(c).
>
> [10] The view I take is reinforced by *Siva Segara v Public Prosecutor* [1984] 2 CLJ 95; [1984] 1 CLJ (Rep) 353 where Abdul Hamid CJ (Malaya) when delivering the judgment of the Federal Court said:

Before proceeding to construe the section, the learned Judge observed that: 'the interpretation must be such that it must meet the legislative purpose of the enactment (See *Duport Steels Ltd v Sirs* [1980] 1 All ER 529)'. And that in the interpretation of a statute its language must be read in what seems to be its natural sense — *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107. The learned Judge also observed that:

The court as guardian of the rights and liberties enshrined in the Constitution is always jealous of any attempt to tamper with rights and liberties … the right in issue here ie, the right to assemble peaceably without arms is not absolute for the Constitution allows Parliament to impose by law such restrictions as it deems necessary in the interests of security and public order … what the court must ensure is only that any such restrictions may not amount to a total prohibition of the basic right so as to nullify or render meaningless the right guaranteed by the Constitution.

We respectfully agree with the views expressed by the learned judge.

[11] There it is. The court must not permit restrictions upon the rights conferred by art 10 that render those rights illusory. In other words, Parliament may only impose such restrictions as are reasonably necessary. To emphasise, only proportionate legislative response is permissible under art 10(2)(c).

[80] The law has developed to such an extent that we now have in our midst the Federal Court case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333. In that case, Gopal Sri Ram FCJ delivered the unanimous decision of the Federal Court with Richard Malanjum CJ (Sabah and Sarawak) and Zulkifli Ahmad Makinudin FCJ (as he then was) as the other two panel members. At p 340 of the MLJ reporting and at p 515 of the CLJ reporting, Gopal Sri Ram FCJ had this to say:

(5) The other principle of constitutional interpretation that is relevant to the present appeal is this. Provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively. Take article 10(2)(c). It says that 'Parliament may by law impose… (c) on the right conferred by para (c) of clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.' Now although the article says 'restrictions', the word 'reasonable' should be read into the provision to qualify the width of the proviso. The reasons for reading the derogation as 'such reasonable restrictions' appear in the judgment of the Court of Appeal in *Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213; [2007] 1 CLJ 19 which reasons are now adopted as part of this judgment. The contrary view expressed by the High Court in *Nordin Salleh v Dewan Undangan Negeri Kelantan* [1992] 1 MLJ 343; [1992] 1 CLJ 463 is clearly an error and is hereby disapproved. The correct position is that when reliance is placed by the State to justify a statute under one or more of the provisions of art 10(2), the question for determination is whether the restriction that the particular statute imposes is reasonably necessary and expedient for one or more of the purposes specified in that article.

[81] We are bound by the Federal Court case of *Sivarasa Rasiah*. The word 'reasonable' should be read into the provision of art 10(2)(a) of the Federal Constitution as reproduced earlier and to consider whether the restriction that art 10(2)(a) imposes is 'reasonably' necessary and expedient for one or more of the purposes specified therein. We need to interpret art 10(1)(a) and art 10(2)(a) of the Federal Constitution generously by adopting a prismatic approach to interpretation.

[82] We took cognisant of the fact that another panel of this court in *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* [2011] 6 MLJ 507 (CA), vigorously applied *Sivarasa Rasiah* and by way of a majority allowed the appeal of the appellants with costs (per Mohd Hishamudin JCA) and with no order for costs (per Linton Albert JCA). Whereas Low Hop Bing JCA dissented and his Lordship dismissed the appeal of the appellants and affirmed the decision of the High Court and as agreed by the parties no order as to costs was made.

[83] Applying *Sivarasa Rasiah*, we will now proceed to consider the reasonableness of the impugned provision — referring to s 4(1)(c) of the Sedition Act, in the context of the appellant's right to 'freedom of speech and expression' under art 10(1)(a) of the Federal Constitution.

[84] Shorn of any embellishment, the appeal before us focussed on the interpretation of art 10(1)(a) of the Federal Constitution. It boils down to the issue of whether the right to freedom of speech and expression is absolute and not restricted in any way. We were urged to construe art 10(1)(a) of the Federal Constitution generously in favour of the appellant. The speech of Raja Azlan Shah Ag LP (as His Majesty then was) in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 (FC), at p 32 was referred to and we were urged to adopt it as a guideline in interpreting art 10(1)(a) of the Federal Constitution. There, His Majesty had this to say:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way — 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v Fisher* [1979] 3 All ER 21). A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the

character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms.' The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in Attorney-General of St Christopher, *Nevis and Anguilla v Reynolds* [1979] 3 All ER 129 136.

It is in the light of this kind of ambulatory approach that we must construe our Constitution.

[85] On behalf of the appellant, it was submitted that restrictions that limit or derogate from the guaranteed right of freedom of speech and expression must be read restrictively.

[86] In exercising our interpretative jurisdiction, we were urged to apply the international and regional human rights law. Section 2 of the Human Rights Commission of Malaysia Act 1999 is the interpretation section where it interprets 'human rights' as referring 'to fundamental liberties as enshrined in Part II of the Federal Constitution'. While s 4(4) of the Human Rights Commission of Malaysia Act 1999 stipulates as follows:

Function and powers of the Commission

4(4) For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution.'

[87] In construing the fundamental rights as enshrined in the Indian Constitution, Indian judges resorted to international conventions and norms. A classic case would be the Supreme Court case of *Vishaka And Others v State of Rajasthan And Others* [1997] 6 SCC 241. There at p 251, JS Verma CJ had this to say:

14 The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. The High Court of Australia in *Minister for Immigration and Ethnic Affairs v Teoh* 128 Aus LR 353 has recognised the concept of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia.

[88] Another panel of this court in *Muhammad Hilman bin Idham & Ors v*

Kerajaan Malaysia & Ors also made reference to article 19 of the Universal Declaration of Human Rights and we were urged to do so as well. Indeed we have done just that. And we concluded by saying that even at international human rights level, there are restrictions to freedom of speech and expression.

[89] Be that as it may, we were urged to hold that the Sedition Act is unconstitutional for two main reasons:

(a) that the violation of arts 10(1)(a) and 10(2)(a) of the Federal Constitution offends the 'reasonableness test'; and

(b) that the violation of the equality provision in art 8(1) of the Federal Constitution offends the 'proportionality test'.

THE REASONABLENESS TEST

[90] In considering the 'reasonableness test', we took into account the scheme of the Sedition Act which is all encompassing. It criminalises speech and expression in different forms. Under the said Act, intention is irrelevant. As long as the speech or publication had a seditious tendency, an offence is committed. It is akin to an offence of strict liability. We reiterate the principles established by *Public Prosecutor v Ooi Kee Saik & Ors* to the effect that the truth or falsity of the words uttered is immaterial and it is not a defence to a charge for sedition. And whether the words complained of could have the effect of producing or did in fact produce any of the consequences listed in s 3(1)(a)– (f) of the Sedition Act is immaterial.

[91] Hitherto the judicial approach in dealing with the offence of sedition in Malaysia has favoured the restrictive approach as compared to the liberal approach adopted by the English common law.

[92] On behalf of the appellant, it was argued that the definition of the words 'seditious tendency' in s 3(1)(a)– (f) of the Sedition Act is so vague that no citizen would know the limit or the boundary to stop while exercising his or her right to free speech and expression. At this juncture, reference was made to the case of *Andrew Mujuni Mwenda v Attorney-General* [2010] UGCC 5, a decision of the Ugandan Constitutional Court, where the court struck down the Ugandan Sedition Act as being unconstitutional. At pp 23–24, Their Lordships had this to say (the judgment of the five panel members of the Ugandan Constitutional Court):

> But that does not solve the fundamental criticism that the wording creating the offence of sedition is so vague that one may not know the boundary to stop at, while exercising one's right under 29(1)(a). M/s Nangwala and Kakuru complained that

the section does not define what sedition is. It is so wide and it catches every body to the extent that it incriminates a person in the enjoyment of one's right of expression of thought. Our people express their thoughts differently depending on the environment of their birth, upbringing and education. While a child brought up in an elite and God fearing society may know how to address an elder or leader politely, his counterpart brought up in a slum environment may make annoying and impolite comments, honestly believing that, that is how to express him/herself. All these different categories of people in our society enjoy equal rights under the Constitution and the law. And they have equal political power of one vote each. That explains counsel Kakuru's observation that during elections voters make very annoying and character assassinating remarks and yet in most cases false, and yet no prosecutions are preferred against them. The reason is because they have a right to criticize their leaders rightly or wrongly. That is why he suggested, rightly so that leaders should grow hard skins to bear. We find that, the way impugned sections were worded have an endless catchment area, to the extent that it infringes one's right enshrined in Article 29(1)(a). We answer issue one in affirmative and in favour of the petitioners.

[93] By way of a rebuttal, the learned deputy public prosecutor pointed out that there is no blanket ban or restriction against lawful criticism under s 3 of the Sedition Act. He rightly pointed out that under art 10(2)(a) of the Federal Constitution which was reproduced earlier, the permissible constitutional restrictions to free speech and expression have been itemised. He submitted that it was *necessary* and *expedient* that these permissbie constitutional restrictions found expression in art 10(2)(a) of the Federal Constitution be put to the fore and applied to all citizens.

[94] It must be borne in mind that the Federal Constitution is a living document. It is not cast in stone. Amendments were made to the Federal Constitution and they will continue to be made in the future.

[95] The learned deputy public prosecutor rightly submitted that the Sedition Act does not prevent freedom of speech and expression. Section 3(2)(a) of the same Act does not prevent criticism of any Ruler provided it is for the purpose of showing 'that any Ruler has been misled or mistaken in any of his measures'. However, criticism of any Ruler is seditious if it is for the purpose of questioning the 'sovereignty, prerogatives, powers and jurisdiction of the Rulers and the prerogatives, powers and jurisdiction of the Ruling Chiefs of Negeri Sembilan within their respective territories' in the context of art 181(1) of the Federal Constitution. We venture to say that criticism of any Ruler in any manner or form, be it in writing or otherwise, be it dissemninated and communicated through the social media via the internet or handphone is seditious if it is for the purpose of belittling any Ruler or if it is for the purpose of removing any Ruler or destroying the fabric of the monarchy altogether. The

internet and the handphone are powerful mechanisms for expression and if they carry seditious materials, they will be caught under the Sedition Act.

[96] However, it is prudent for every citizen to take heed of the advice of His Majesty in *Public Prosecutor v Ooi Kee Saik & Ors* as to the dividing line between freedom of speech and sedition.

[97] The learned deputy public prosecutor rightly submitted that the Ugandan case — referring to *Andrew Mujuni Mwenda & Anor v Attorney General* [2010] UGCC 5, cannot be applied in Malaysia. We have a different set of society and we have the sovereignty of the Malay Rulers enshrined in the Federal Constitution that differentiated us from Uganda.

[98] Article 4(2)(b) of the Federal Constitution states that the validity of any law shall not be questioned on the ground that it imposes such restrictions as are mentioned in art 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article. Thus, it clearly ruled out the prerogative of even the courts to question the validity of those laws that fall within the scope of art 10(2)(a) of the Federal Constitution. In this context, it is germane to refer to the Supreme Court case of *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566, at p 575, where Edgar Joseph Jr SCJ delivering the judgment of the Supreme Court aptly said:

> So, for example, if the impugned law, in pith and substance, is a law relating to the subjects enumerated under the permitted restrictions found in cl 10(2)(a), the question whether it is reasonable does not arise; the law would be valid.

[99] In *Public Prosecutor v Param Cumaraswamy (No 2)* [1986] 1 MLJ 518, NH Chan J (later JCA) correctly held the view that the Sedition Act is constitutional within the purview of art 10(2) of the Federal Constitution. At p 519 of the report, His Lordship had this to say and it is still good law until today:

> In this country, just as in every country, there cannot be absolute freedom when we speak of fundamental rights (or human rights). In all common law countries, whether we have the Dicey Rule of Law or a Bill of Rights (as in the United States) or a written constitution, freedom is not an absolute right. Lord Denning calls it: freedom under the law. This telling phrase was coined by him in 1949; he was 'the first and true inventor' of it: see *The Family Story* pp 177–8.

[100] In our judgment, the Sedition Act is constitutional and it does not violate arts 10(1)(a) and 10(2)(a) of the Federal Constitution. It does not offend the reasonableness test. It is reasonable to maintain the Sedition Act because, 'The Government has a right to preserve public peace and order, and therefore, has a good right to prohibit the propagation of opinions which have

a seditious tendency' (to borrow the words of His Majesty in *Public Prosecutor v Ooi Kee Saik & Ors*). A

THE PROPORTIONALITY TEST

[101] It is the duty of the court to ascertain whether s 4(1)(c) of the Sedition Act is proportionate to the objective it seeks to achieve. This test of proportionality was enunciated by the Federal Court in *Sivarasa Rasiah*. B

[102] Statements having 'seditious tendency' without regard to the intention of the maker making those statements and whether the words expressed are true or otherwise and whether the statements made will incite violence or public order are all caught within the purview of the Sedition Act. The proportionality test must be viewed in the context of the purpose of the Sedition Act, namely the prevention of public disorder and the maintenance of public order. C D

[103] The Sedition Act is proportionate to the necessity to safeguard the security of the federation and to maintain law and order as well as to avoid incitement. In particular, the impugned provision does not overreach art 10(2)(a) of the Federal Constitution and it is substantively fair and proportionate and thus it does not violate the equality provision in art 8(1) of the Federal Constitution. In *Shri Ram Krishna Dalmia and 3 Others v Shri Justice SR Tendoikar and 3 Others* AIR 1958 SC 538, the Indian Supreme Court speaking through Chief Justice SR Das at pp 547–548 held as follows: E F

> (b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;
>
> (c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds; G
>
> (e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and H
>
> (f) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation. I

[104] We gratefully adopt the principles enunciated in the above mentioned passages and we hold that the impugned provision is constitutional and it passed the proportionality test with flying colours.

[105] At the risk of repetiting ourselves, we must categorically state that the presumption of constitutionality operates in favour of the Sedition Act which was passed by Parliament.

CONCLUSION

[106] It is said that the Sedition Act is draconian and arbitrarily restrict the right to freedom of speech and expression. It is also said that the Sedition Act stifled legitimate criticism of government policies and it curtailed dissenting opinions. But it must be recalled that in 1970, the Sedition Act was amended in response to the 13 May 1969 racial riots in the country. The racial riots erupted because of inflammatory speeches made by electoral contestants during the 1969 general election campaign where issues pertaining to the national language, special position of the Malays were debated and called into question. The Yang di-Pertuan Agong declared a state emergency on 15 May 1969. The Emergency (Essential Powers) Ordinance No 45 of 1970 was enacted and it made an offence to question these issues. The 1970 amendment to the Sedition Act saw the incorporation of para (f) to sub-s (1) of s 3 which was reproduced earlier.

[107] It is apparent that the 1970 amendment broadened the scope of the definition of 'seditious tendency' by making it an offence for any public discussion questioning the provisions of Part III of the Federal Constitution or arts 152, 153 and 181 of the Federal Constitution.

[108] It is the duty of the court to interpret and uphold the law. The 1970 amendment is unique in that it raises a presumption of law that anything falling squarely within the terms thereof has a seditious tendency. The court in *Melan bin Abdullah & Anor v Public Prosecutor* had to consider whether a subheading in the editorial of a newspaper stating, 'Abolish Tamil or Chinese medium schools in this country' was a seditious publication. The court held that the subheading clearly violated proviso (a) of art 152(1) of the Federal Constitution and therefore it came squarely within the definition of 'seditious tendency' in s 3(1)(f) of the Sedition Act.

[109] In deciding whether the words have the seditious tendency, it is ideal to borrow the sage words of Coleridge J in *R v Aldred* (1909) 22 Cox CC 1 at p 3:

> … to look at all the circumstances surrounding the publication with the view of seeing whether the language used is calculated to produce the results imputed; that is to say, you are entitled to look at the audience addressed, because language which would be innocuous, practically speaking, if used to an assembly of professors or divines, might produce a different result if used before an excited audience of young and uneducated men.

[110] Cave J, on the other hand, in *R v Burns & Others* (1886) 16 Cox CC 355 365 commented on the seriousness of the offence of sedition in these erudite terms:

> A man cannot escape from the consequences of uttering words with intent (a seditious tendency) to excite people to violence solely because the persons to whom they are addressed may be too wise or too temperate to be seduced (by those words) into that violence. That has, however, no important bearing in this case.

[111] But, it must be borne in mind, that an ordinary citizen who reads the article will not analyse it paragraph by paragraph or word by word in isolation in order to determine its meaning. The ordinary citizen will endeavour to read the article as a whole and it is the impression that is imprinted in his mind after reading the article that is of relevance. It is the duty of the court, in our judgment, to read the article in the manner which is suggested and decide whether the article when so read is expressive of a seditious tendency within the meaning of s 3(1)(a) to (f) of the Sedition Act.

[112] To be seditious, the words uttered or published must have a tendency to achieve one or more of the objects specified in s 3(1) of the Sedition Act. In a prosecution under s 4(1)(c) of the Sedition Act, there is no requirement on the part of the public prosecutor to specify in the charge on which of the six tendencies set out in s 3(1) of the same Act he relies upon and it is open to him during the course of the trial to pick and choose *(Fan Yew Teng v Public Prosecutor*).

[113] We were invited to hold that the Sedition Act be declared null and void. We declined the invitation.

[114] It is germane, at this juncture, to refer to the decision of Raja Azlan Shah FJ (as His Majesty then was) in the case of *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187(FC). There, His Majesty, writing a separate judgment, had this to say at p 188 of the report:

> The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause

as the fundamental rights guaranteed by the Constitution, for as was said by Lord Macnaghten in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 118:

> Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret That may be a matter for private judgment The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.
>
> It is the province of the courts to expound the law and 'the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction' — per Roskill LJ in *Henry v Geopresco International Ltd* [1975] 2 All ER 702 718. Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the Legislature, and not the courts; they have their remedy at the ballot box.

[115] In our judgment, the Sedition Act being a pre-Merdeka law is good law and it is still valid up to this very day. The validity of the Sedition Act comes under the saving provisions of art 162 of the Federal Constitution.

[116] The Sedition Act falls squarely within the framework of art 10(2) of the Federal Constitution and its validity and constitutionality cannot be challenged.

[117] In open court, after anxiously listening to the oral submissions of the parties, we announced our unanimous decision as follows:

> We have deliberated at length and we are of the considered view that s 4(1)(c) of the Sedition Act does not infringe the reasonable test and the proportionality test by virtue of s 3(2) of the same Act. Hence, we conclude that s 4(1)(c) of the same Act is constitutionally enacted by Parliament and remain a valid and enforceable law until today. We accordingly dismiss the appeal and we direct that the appellant is to appear before the Sessions Court on 5.6.2013 for mention to enable the Sessions Court Judge to hear the case on its merits.

[118] After announcing our decision, learned counsel for the appellant applied for a stay. He pointed out that as a matter of public interest, the questions of law which were raised need to be argued before the Federal Court. The learned deputy public prosecutor magnanimously agreed to the stay. That being the case, we granted the stay forthwith.

[119] We are grateful to learned counsel for the appellant and to the learned deputy public prosecutor for assisting us in arriving at our decision.

Appeal dismissed.

Reported by Afiq Mohamad Noor